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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CURTIS MARKSON, MARK MCGEORGE, CLOIS MCCLENDON, and ERIC CLARK, individually and on behalf of all others similarly situated, Plaintiffs vs. CRST INTERNATIONAL, INC., CRST EXPEDITED, INC., C.R. ENGLAND, INC., WESTERN EXPRESS, INC., SCHNEIDER NATIONAL CARRIERS, INC., SOUTHERN REFRIGERATED TRANSPORT, INC., COVENANT TRANSPORT, INC., PASCHALL	No. 5:17-cv-01261-SB (SPx) **STATEMENT OF INTEREST OF THE UNITED STATES** Date: August 5, 2022 Time: 8:30 a.m. Location: Courtroom 6C Judge: Hon. Stanley Blumenfeld, Jr.

TRUCK LINES, INC., STEVENS TRANSPORT, INC., and DOES 1-10, inclusive,

Defendants.

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INTEREST OF THE UNITED STATES

The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal or state court. The United States enforces the federal antitrust laws and has a strong interest in promoting competition and seeing that the Sherman Act's prohibitions on restraints of trade, 15 U.S.C. § 1, are fully and correctly applied to all markets—including labor markets. The United States also has a significant interest in preventing labor market collusion and other agreements that harm competition for workers.[1]

The United States files this Statement of Interest in response to the parties' motions for summary judgment, ECF No. 613, and supporting memorandum, ECF No. 620 ("MSJ"), to address the appropriate standard for analyzing when "no-hire agreements" violate the Sherman Act. The United States takes no position on

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[1] The United States has addressed agreements that harm workers in statements of interest and amicus briefs in other cases. *See* Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. 2019) (No. 2:18-mc-00798-JFC), https://www.justice.gov/atr/case-document/file/1131056/download (no-hire and non-solicitation agreements); Statement of Interest of the United States, *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758 (M.D.N.C. 2019), https://www.justice.gov/atr/case-document/file/1141756/download (no-hire agreements); Brief of Amicus United States of America in Support of Neither Party, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc. et al.*, 9 F.4th 1102 (9th Cir. 2021), https://www.justice.gov/atr/case-document/file/1338731/download (non-solicitation agreements); Statement of Interest of the United States, *In re Outpatient Med. Ctr. Emp. Antitrust Litig.,* No. 21-cv-00305 (N.D. Ill. Dec. 9, 2021), https://www.justice.gov/atr/case-document/file/1456106/download (no-hire and non-solicitation agreement); Statement of Interest of the United States, *Beck v. Pickert Med. Grp.*, No. CV21-02092, Nev. Second Judicial District Court (Feb. 25, 2022), https://www.justice.gov/atr/case-document/file/1477091/download (non-compete agreements).

whether there were no-hire agreements between Defendants and offers no view on any other issue in this case except the proper standard for assessing the legality of no-hire agreements. The United States also plans to seek leave to participate in the oral argument currently scheduled for August 5, 2022.

Agreements among competitors to allocate markets have long been condemned as per se unlawful. As this Court has already recognized, the same rule applies whether competitors agree to allocate markets for customers or workers. *See Markson v. CRST Int'l, Inc.*, No. 5:17-CV-01261-SB-SP, 2021 WL 1156863, at *4 (C.D. Cal. Feb. 10, 2021). In either case, the agreement eliminates or limits competition among rivals and therefore violates the antitrust laws. The United States thus urges the Court to analyze any no-hire agreements between Defendants under the per se rule.

BACKGROUND

I. Legal Background

A. The Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, outlaws "[e]very contract, combination . . . or conspiracy" that unreasonably restrains trade, *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 98 (1984). "Restraints can be unreasonable in one of two ways." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) ("*Amex*"). Congress condemned some restraints as per se unreasonable based on their inherently anticompetitive "nature and character." *Standard Oil Co. v. United States*, 221 U.S. 1, 64–65 (1911). "Restraints that are not unreasonable per se are judged under the 'rule of reason,'" which involves a "fact-specific assessment" of "the restraint's actual effect on competition." *Amex*, 138 S. Ct. at 2284 (internal quotation marks and brackets omitted).

When restraints are illegal per se, they are "unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5

(1958). Companies are thus forbidden to enter into per se illegal agreements even if, in an individual case, there is a theoretical possibility that the agreement is benign or beneficial. *See Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 351 (1982) ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."). As the Supreme Court has explained, "[t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

Certain types of horizontal agreements, such as price fixing, output restrictions, and market allocations, have long been recognized as illegal per se. *See, e.g.*, *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996). These agreements are termed "horizontal" because they are agreements between actual or potential competitors, e.g., two rival car dealerships, "on the way in which they will compete with one another." *Bd. of Regents*, 468 U.S. at 99. "Horizontal agreements" contrast with "vertical agreements," which are "'imposed by agreement between firms at different levels of distribution'" on matters over which they do not compete. *Amex*, 138 S. Ct. at 2284 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988)). Horizontal market allocations—including the no-hire agreements alleged here—are particularly harmful because they eliminate or limit competition among rivals along numerous dimensions, including price and non-price terms. *See, e.g., Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ("It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.”).

Courts have recognized a limited defense to the per se rule when an agreement is considered “ancillary” to a “business association or joint venture.” *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). Under Ninth Circuit law, there are two requirements for an agreement to be ancillary. First, the agreement must be “‘subordinate and collateral to a separate, legitimate’” collaboration. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)). Second, the agreement must be “‘reasonably necessary’” to achieving the potentially procompetitive purpose of the collaboration. *Id.* (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899)).

The “reasonably necessary” requirement ensures that defendants refrain from using restraints that have potential procompetitive benefits which can be achieved through reasonably less anticompetitive means. For example, in *Blackburn v. Sweeney*, 53 F.3d 825, 828–29 (7th Cir. 1995), the Seventh Circuit held that an agreement among former partners to refrain from advertising in each other’s territories was not ancillary to the dissolution of a partnership, in part because of its unreasonable duration. *Id.* at 828 (“Defendants’ contention that the advertising Agreement is a legitimate covenant not to compete, ancillary to the dissolution of the partnership, is further undermined by the Agreement’s infinite duration.”).[2] In *Snow v. Align Tech., Inc.*, No. 21-cv-03269-VC, 2022 WL 468704 (N.D. Cal. Feb. 16, 2022), a manufacturer of dental aligners licensed its patent to a competitor in return for royalties and referrals, and agreed not to compete with the competitor in direct-to-consumer sales. The district court, applying *Aya*, held that

[2] The Seventh Circuit separately concluded that the agreement was not ancillary to the dissolution of the partnership because it took place after the partnership was dissolved. *See Blackburn*, 53 F.3d at 828.

the complaint plausibly alleged that the restraint was illegal per se because the agreement not to compete—which effectively gave the competitor a monopoly over direct-to-consumer sales—was not reasonably necessary to achieve the procompetitive purpose of expanding the buyer market from dentists to consumers. *Id.* at *4.

While ancillary agreements are exempt from per se treatment, they are not exempt from antitrust liability. Instead, they are scrutinized under the rule of reason, which asks whether the agreement is, on balance, anticompetitive. *See, e.g.*, *Rothery Storage*, 792 F.2d at 214.

B. Application of the Sherman Act to Labor Markets

The Sherman Act protects competition in all markets, including labor markets as well as product markets. The law "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (internal citations omitted). That the law applies to labor markets in particular has long been settled. *See United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687, at *5 (E.D. Tex. Nov. 29, 2021) ("The Supreme Court has made clear that the Sherman Act applies equally to all industries and markets—to sellers and buyers, to goods and services, and consequently to buyers of services—otherwise known as employers in the labor market."); *see also Anderson v. Shipowners Ass'n*, 272 U.S. 359, 363–64 (1926) (agreements "related to the employment of seamen for service on ships"); *NCAA v. Alston*, 141 S. Ct. 2141, 2161 (2021) ("market for student-athletes' labor").

Just as healthy product-market competition involves multiple firms competing for consumers by reducing prices, or improving quality or innovation, firms compete for workers by improving wages, benefits, or conditions of employment. Thus, for there to be competition in labor markets, workers must be able to move from employer to employer.

A no-hire agreement is a type of horizontal market allocation agreement between two or more employers that eliminates or limits competition among them for workers. These agreements limit the ability of workers to switch employers, depriving workers of the benefits of competition for their labor, including better wages, benefits, and other terms of employment. *See* Herbert Hovenkamp, *Competition Policy for Labour Markets*, OECD (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3092&context=faculty_scholarship. Limiting labor market competition results in lower wages and worse working conditions because employers are no longer forced to compete against each other for the best workers.

Recent studies make clear that collusion in labor markets is a significant problem for workers and for the economy. *See, e.g.*, U.S. Dep't of Treasury, *The State of Labor Market Competition*, (March 7, 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf (summarizing empirical evidence and academic studies).

II. <u>Relevant Allegations and Procedural History</u>

The Fourth Amended Complaint alleges as follows: Defendants—several transportation and logistics companies—have entered horizontal no-hire agreements under which they agree not to hire drivers "under contract" with any of the other defendants. *See* Fourth Am. Compl., ECF No. 228. "Under contract" drivers are defined to include both current drivers and *former* drivers who have not paid off certain loans even if the drivers are actually unemployed. *Id.* ¶¶ 58, 61 ("Until the tuition is repaid in full with interest, the driver is deemed to remain 'under contract.'"). Plaintiffs are truck drivers and former truck drivers who claim they were victims of the alleged no-hire agreements.

Defendant CRST also requires employees to enter covenants not to compete that prohibit them from obtaining work with any other "motor carrier" as long as drivers' loans are not fully paid. *Id.* ¶ 3. These covenants not to compete have no geographical limit, *id*., Ex. 1, part 11(b), and both the no-hire agreements and the non-competes have no clear time limit, and thus could apply indefinitely to former employees who are unable to repay their debts to Defendants. As a result, former employees of Defendants who are unable to pay their debts may be forced to remain unemployed, unable to earn the income needed to pay off their debts. *Id.* ¶¶ 62–63. Moreover, because the non-competes also prohibit former drivers from working as "independent contractor[s]," *id*. ¶ 3, they prevent horizontal competition by Defendants' former drivers.

Plaintiffs have sued Defendants under the Sherman Act and California law. *Id.* ¶¶ 9–10. On July 9, 2022, Defendants C.R. England, Inc., CRST International, Inc., and CRST Expedited, Inc. moved for summary judgment on Plaintiffs' antitrust claims. The United States hereby submits this Statement of Interest to address the proper application of the per se rule to no-hire agreements.

ARGUMENT

I. No-Hire Agreements Are Per Se Violations of Section 1 of the Sherman Act

No-hire agreements are horizontal market allocations, a type of agreement long held to be per se unlawful under the Sherman Act. *See In re Ry. Indus. Emp. No-Poach Antitrust Litig*., 395 F. Supp. 3d 464, 482 (W.D. Pa. 2019) (holding that employee no-poach agreements are per se illegal market divisions); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (same); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (same). When competitors agree to divide a market, they have committed a per se illegal violation of the Sherman Act "regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam).

Forbidden market allocations can exist in various ways. They can be territorial agreements in which competitors split geographical markets among themselves. For example, in *Palmer*, two bar review companies—HBJ and BRG—agreed not to offer bar review courses in each other's geographical markets. *Id.* at 47. The Supreme Court held that the agreement to divide territory between the companies was "unlawful on its face." *Id.* at 50. Alternatively, such agreements can involve the allocation of customers or employees rather than geographical territory, and can take the form of complete bans on competition, such as no-hire or no-sale agreements. They may also be of more limited scope, such as "no-solicitation" clauses pertaining to one another's workers or customers. For example, in *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir. 1978), a number of companies in the business of supplying industrial uniforms agreed to refrain from soliciting each other's current customers. The companies also committed to "active discouragement" of other uniform supply companies' current customers "from changing suppliers," in the event that the customers sought them out. *Id.* at 1081. The Fifth Circuit explained that both territorial and customer allocation agreements are per se violations of law: there is no "significant difference between an allocation of customers and an allocation of territory" and consequently "the allocation of customers is a per se violation of Section One of the Sherman Act." *Id.* at 1088, 1090; *see also United States v. Topco Assocs.*, 405 U.S. 596, 612 (1972) ("We also strike down Topco's other restrictions on the right of its members to wholesale goods. These restrictions amount to regulation of the customers to whom members of Topco may sell Topco-brand goods."); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) ("[W]e find that the so-called 'no-solicitation' agreement alleged in this case is undeniably a type of customer allocation scheme which courts have often condemned in the past as a *per se* violation of the Sherman Act.").

Whether market allocation agreements are based on territory, customers, or workers, they cause the same harm: they prevent those unhappy with one company from taking their business to another company, and thus reduce the competitive pressure to lower product prices, raise wages, and improve quality. The per se rule therefore applies equally in customer-facing and supplier-facing markets, i.e., markets for component parts or labor. Faced with the case of sugar refiners who conspired to fix prices on sugar beets (a sugar input), the Supreme Court explained: "It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers." *Mandeville Island Farms*, 334 U.S. at 235; *see also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988–89 (9th Cir. 2000) ("Most courts understand that a buying cartel's low buying prices are illegal and bring antitrust injury and standing to the victimized suppliers."); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (market allocation by billboard advertising companies of an input, billboard sites, was per se illegal); *Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 105 (3d Cir. 2010) (defendants' contention that a buyer exercising monopsony power is permissible because it lowers prices for downstream consumers "reflects a basic misunderstanding of the antitrust laws").

The same rule applies for market allocations in labor markets. Contrary to Defendants' argument, MSJ at 17–18, the application of the per se rule does not need to be "rejustified for every industry that has not been subject to significant antitrust litigation." *Maricopa*, 457 U.S. at 351. And while prior experience with a particular restraint is relevant when courts are considering whether to apply "a *new per se* rule," *id.* at 349 n.19 (emphasis in original), that is not relevant here because the per se rule against market allocation is well-established, *id.* at 349. Moreover, like other suppliers, employees supply an input—labor—and courts have repeatedly recognized claims against employers who engage in anticompetitive behavior in labor markets. In *Anderson*, for example, the Supreme Court recognized a claim by sailors against a cartel of shipowners who allocated the sailors to employers and fixed the sailors' wages. 272 U.S. at 362–65. And in *Alston*, the Court recognized a claim by student athletes against universities that fixed their compensation. 141 S. Ct. at 2154, 2166; s*ee also id.* at 2167–68 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.").

Accordingly, just as customer-allocation agreements are per se illegal market divisions in product markets, employee-allocation agreements are per se illegal market divisions in labor markets.

II. <u>If the Court Finds the Alleged No-Hire Agreements Between Defendants Exist, They Should Be Analyzed Under the Per Se Rule</u>

Consistent with the principles described above, this Court has already recognized that Plaintiffs adequately alleged that Defendants' alleged horizontal no-hire agreements are per se illegal. *See Markson*, No. 5:17-CV-01261-SB-SP, 2021 WL 1156863, at *4.

Because horizontal no-hire agreements are per se illegal, Defendants' argument that the alleged no-hire agreements have "a plausible procompetitive effect," MSJ at 19, is foreclosed by precedent. *See, e.g.*, *Maricopa*, 457 U.S. at 351 ("The anticompetitive potential inherent" in all per se agreements "justifies their facial invalidation even if procompetitive justifications are offered for some."); *Topco*, 405 U.S. at 610 ("In applying these rigid [per se] rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition."); *United States v. Aiyer*, 33 F.4th 97, 119 (2d Cir. 2022) ("no need" for courts "to consider 'demonstrable economic effect[s]'" when evaluating per se conduct in light of its "inherent" anticompetitive potential).

The limited defense available for ancillary restraints, *see Aya*, 9 F.4th at 1109, does not help Defendants. Defendants argue that the alleged no-hire agreements should be analyzed under the rule of reason because they help guarantee a "return on . . . investment" for training new employees. MSJ at 20. This is not a cognizable ancillary-restraints argument. That a restraint purportedly has some procompetitive effects does not justify invoking the ancillary-restraints doctrine unless the restraint is "subordinate and collateral to a separate" collaboration. *Aya*, 9 F.4th at 1109. Defendants identify no such collaboration here.

Furthermore, Defendants do not explain why the alleged no-hire agreements are "reasonably necessary" to achieve any procompetitive end. *Id.* In fact, Defendants contend that a horizontal agreement among them is *unnecessary*, and "makes no economic sense," because each Defendant has "an independent and well-founded interest in avoiding being hit with a costly suit for tortious interference." MSJ at 12–13. There are also reasonably less-restrictive ways in which Defendants could recoup the cost of training employees. Defendants could, for example, enter into agreements *with drivers* requiring them to reimburse the costs of providing training if they leave for another firm soon after they are hired (or under some other, more reasonable set of conditions) rather than entering into horizontal no-hire agreements *with their competitors*. *See, e.g.*, Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 Santa Clara L. Rev. 579, 603 (2020) (discussing "contractual methods by which employers can secure their confidential commercial information and be reimbursed for the training and other investments they have taken in their employees . . . short of outright restraints on worker mobility"). Defendants already require trainees to enter into "vertical employment contracts." *See* MSJ at 5 ("CRST's vertical employment contracts constitute the primary means by which CRST receives enough return on its investment to operate and maintain its [driver training program].").

Preventing drivers from obtaining a job with another company, however, blocks one means for Defendants to be reimbursed for the costs of training, because drivers will lose opportunities to increase their income. It also could mean fewer drivers on the road at a time when companies are facing "serious and chronic driver shortages," MSJ at 20, and consumers are struggling with the consequences of supply chain issues. And it is not likely to be reasonably necessary for recovering employer expenditures on training because the ordinary costs of job search and relocation already likely prevent workers from frequently switching from job to job.

Moreover, every firm must invest in acquiring new employees and customers. That does not justify horizontal market-allocation agreements. Consider a firm making an up-front investment in a consumer product or service, e.g., companies providing consumers with discounted cell phones to use on their network. The need to invest in acquiring new consumers does not mean Verizon and AT&T could agree not to poach customers from each other. *See, e.g.*, *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1433, 1444 (9th Cir. 1996) (agreement among power companies to allocate market, avoiding "the duplication of transmission lines and poles, substations, and transformers," was "a per se violation of § 1 of the Sherman Act"). Defendants have not explained why labor markets should be treated any differently. Nor can employers eliminate labor-market competition using horizontal no-hire agreements based on a (legally unenforceable and speculative) promise that they will invest more in workers. The possibility that horizontal restraints might encourage defendants to invest in customers or workers does not override the judgment by Congress that competition—not agreements among competitors—"is the best method of allocating resources." *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695; *see also N. Pac. Ry. Co.*, 356 U.S. at 4 ("[T]he policy unequivocally laid down by the [Sherman] Act is competition").

It is equally irrelevant that Defendants' alleged horizontal agreements purportedly aim to prevent tortious interference, including "interfer[ence] with . . . fixed-term employment contracts." MSJ at 17. In *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941), the Supreme Court concluded that an agreement among competing clothing designers not to sell their garments at stores selling copycat designs was per se unlawful. While the designers argued that their agreements "protect[ed] . . . against the devastating evils growing from the pirating of original designs," the Court held that this evidence "[was] no more material than would be the reasonableness of the prices fixed by an unlawful combination." *Id.* at 468. The Court added that protecting against "tortious" conduct did "not justify . . . combining together to regulate and restrain interstate commerce in violation of federal law." *Id.* The same is true here. Even assuming arguendo that hiring drivers "under contract" with a rival firm is actually tortious conduct under applicable state law, an agreement among competing trucking companies not to interfere with each other's employment contracts, i.e., to allocate markets, still violates the Sherman Act. *See Cadillac Overall Supply*, 568 F.2d at 1087–1090 (need to "assur[e] non-interference with . . . service contracts" did not save "allocation of customers" from per se treatment).

Defendants' argument that courts "routinely apply the rule of reason to hiring restrictions" is wrong and the cases they cite are inapposite. *See* MSJ at 20. As noted above, Defendants have not established that the alleged no-hire agreements are ancillary restraints. The ancillary-restraint cases they cite applying the rule of reason are therefore distinguishable. *See Aya*, 9 F.4th at 1110 ("the challenged restraint is reasonably necessary to the parties' procompetitive collaboration"); *Deslandes v. McDonald's USA, LLC*, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018) ("ancillary to franchise agreements"); *Conrad v. Jimmy John's Franchise, LLC*, 2021 WL 3268339, at *10 (S.D. Ill. July 30, 2021) (same); *Kelsey K. v. NFL Enterprises LLC*, 2017 WL 3115169, at *4 (N.D. Cal. July 21, 2017) ("reasonably necessary to a larger legitimate collaboration"); *Hanger v. Berkley Group, Inc.*, 2015 WL 3439255, *5–7 (W.D. Va. May 28, 2015) ("the restraint challenged in this lawsuit is one piece of a global settlement agreement between the parties to resolve three suits in two states"); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 146 (3d Cir. 2001) (sale of a business); *Coleman v. Gen. Elec. Co.*, 643 F. Supp. 1229, 1232 (E.D. Tenn. 1986) (same); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 862 (M.D. Tenn. 1980) (same). *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999), which Defendants also cite, MSJ at 18–20, addressed what the court viewed as "an intra firm agreement." 166 F.3d at 515–16. This case, in contrast, addresses the type of "classic interfirm horizontal restraint of trade" that the *Bogan* court thought was absent. *See id.* at 515. *Deslandes*, another case cited by Defendants, MSJ at 20, also explicitly rejected Defendants' argument that the need to invest in training workers justifies a naked no-hire agreement. 2018 WL 3105955, at *8 ("[E]very employer fears losing the employees it has trained. That fear does not, however, justify, say, law firms agreeing not to hire each other's associates. Employers have plenty of other means to encourage their employees to stay without resorting to unlawful market division.").

Accordingly, the Court should reject Defendants' attempt to justify the alleged no-hire agreements as deserving anything less than per se treatment. *See Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984) ("The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category.”).

CONCLUSION

For the reasons above, the United States respectfully requests that the Court analyze any no-hire agreements between Defendants under the per se rule consistent with well-established precedent.

Dated: July 15, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, I electronically filed the foregoing brief by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Eric D. Dunn
ERIC D. DUNN